Supreme Court, U.S.
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No. 991839

In The

Supreme Court of the United States

EDWARD HARRIS,

Petitioner,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the statutory and regulatory presumption of soundness can be rebutted by a post-service medical opinion, which is not supported by contemporaneous pre-service medical evidence documenting a pre-service disease or injury.

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 103 F.3d 1347 (2000) and reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Veterans Appeals in *Harris v. West* is published as 11 Vet.App. 456 (1998) and reprinted at App. 9.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on February 17, 2000.

PROVISIONS INVOLVED

38 U.S.C. § 1111. Presumption of sound condition.

> For the purposes of section 1110 of this title, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and

> enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

38 C.F.R. § 3.304 Direct service connection; wartime and peacetime.

(a) General. The basic considerations relating to service connection are stated in Sec. 3.303. The criteria in this section apply only to disabilities which may have resulted from service in a period of war or service rendered on or after January 1, 1947.

(b) Presumption of soundness. The veteran will be considered to have been in sound condition when examined, accepted and enrolled for service, except as to defects, infirmities, or disorders noted at entrance into service, or where clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto. Only such conditions as are recorded in examination reports are to be considered as noted.

(1) History of preservice existence of conditions recorded at the time of examination does not constitute a notation of such conditions but will be considered together with all other material evidence in determinations as to inception. Determinations should not be based on medical judgment alone as distinguished from accepted medical principles, or on history alone without regard to clinical factors pertinent to the basic character, origin and development of such injury or disease. They should be based on thorough analysis of the evidentiary showing and careful correlation of all material facts, with

due regard to accepted medical principles pertaining to the history, manifestations, clinical course, and character of the particular injury or disease or residuals thereof.

(2) History conforming to accepted medical principles should be given due consideration, in conjunction with basic clinical data, and be accorded probative value consistent with accepted medical and evidentiary principles in relation to value consistent with accepted medical evidence relating to incurrence, symptoms and course of the injury or disease, including official and other records made prior to, during or subsequent to service, together with all other lay and medical evidence concerning the inception, development and manifestations of the particular condition will be taken into full account.

(3) Signed statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect if other data do not establish the fact. Other evidence will be considered as though such statements were not of record.

STATEMENT OF THE CASE

The Appellant is an Army veteran who served on active duty from August 1949 to November 1952. Prior to entering the service, the Appellant underwent eye

surgery to correct an alternating convergent strabismus.[1] Prior to service, the Appellant was not diagnosed or treated for either chorioretinitis or retinitis pigmentosa. Further, the Appellant's 1949 service medical entrance examination contained no notation of chorioretinitis or retinitis pigmentosa. In May 1951, the Appellant was hospitalized for complaints of poor night vision. At that time, the Appellant stated that he had an eight year history of poor night vision that has worsened in the last year. Consequently, the Appellant was diagnosed, by the Army, with chorioretinitis[2] and was honorably discharged from service.

In 1955, the Appellant was diagnosed, by the Veterans' Administration (hereinafter referred to as "the VA"), with retinitis pigmentosa[3] after he applied for hospital treatment or domiciliary care due to his progressive eyesight deterioration. As a result of his diagnosis, the Appellant applied for benefits claiming that his retinitis pigmentosa was service connected. This claim was initially denied in 1959.

The Appellant submitted several requests to reopen his claim, all of which were denied by the VA after reviewing the evidence of record. The evidence of record

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[1] Strabismus is a deviation of the eye which the patient cannot overcome, commonly known as a squint. Dorlands Pocket Medical Dictionary, 25th Ed., p. 762.

[2] Inflammation of the choroid and retina. Dorland's Medical Dictionary, 25th Ed., p. 167.

[3] Inflammation of the retina, marked by progressive loss of retinal response and contraction of the visual field. Dorland's Medical Dictionary, 25th Ed., p. 701.

contained the Appellant's own statements regarding his history of poor night vision and VA examiner reports based upon the Appellant's statements.

After a lengthy procedural history, the VA's Board of Veterans' Appeals (hereinafter referred to as "the BVA") requested a medical expert opinion from a VA hospital. The VA medical expert reported, that based upon the Appellant's own history of poor night vision, that the Appellant's retinitis pigmentosa existed prior to his induction into service. Based, in large part, upon this expert's report, the BVA denied the Appellant's claim for benefits, finding that his retinitis pigmentosa existed prior to service.

The Appellant appealed this decision to the Court of Appeals for Veteran Claims ("CAVC"), claiming that the BVA failed to apply the presumption of soundness. The Appellant argued that the statutory and regulatory presumption of soundness attached in the present case because his service entrance examination contained no notation of retinitis pigmentosa, and that since he was diagnosed with the disease in service, he was entitled to benefits.

The CAVC found that although the Appellant was entitled to the presumption of soundness, that the presumption had been rebutted by clear and unmistakable evidence. Specifically, the CAVC found that the medical reports since service noted symptoms of night blindness since childhood and that expert opinion based upon such reports established that the disease pre-existed service. Consequently, the CAVC affirmed the BVA opinion denying the Appellant's claim.

On appeal to the Federal Circuit, the Appellant argued that pursuant to the plain language of 38 U.S.C. § 1111 and the CAVC's own case law, that the presumption of soundness could not be rebutted by post-service medical opinion that was not also supported alone, but there must also by pre-service contemporaneous clinical evidence or recorded history of the disease. The Appellant argued that in the present case, there was no pre-service contemporaneous clinical evidence or recorded history of retinitis pigmentosa upon which the post-service medical opinion could have been based. Instead, there was the Appellant's own statements of a history of poor night vision. Further, that the VA's medical expert opinion was all premised on the Appellant's statements regarding his history of poor night vision and not based upon any contemporaneous clinical evidence or recorded history of retinitis pigmentosa.

In affirming the CAVC's decision, the Federal Circuit first determined that the statutory presumption of soundness, as contained in 38 U.S.C. § 1111 contains no guidance on the type of evidence that constitutes "clear and unmistakable evidence" necessary to rebut the presumption. As such, the Federal Circuit held that all the statute requires is that "the evidence, whatever it may be, must lead, clearly and unmistakably, to the conclusion that the injury or disease existed before the veteran entered service." *Harris*, 203 F.3d 1347 at 1349 (Fed. Cir. 2000).

The Federal Circuit further found that the 38 C.F.R. § 3.304(b) is the regulation that elaborates on the statutory presumption of soundness. The Federal Circuit determined that pursuant to 38 C.F.R. § 3.304(b)(1) and (2), that the finder of fact should consider all medically

accepted evidence in determining whether the presumption had been rebutted, including records made subsequent to service. As such, the Federal Circuit held that the regulation did not support Appellant's contention that the presumption of soundness could be rebutted only if there is preservice contemporaneous medical evidence or recorded history.

Finally, the Federal Circuit held that the CAVC's case law did not provide an absolute rule requiring contemporaneous clinical evidence or recorded history. As such, the Federal Circuit ultimately concluded that although contemporaneous clinical evidence or medical history may often be necessary to rebut the presumption of soundness, that in the present case where a "later medical opinion is based on statements made by the veteran about the preservice history of his condition, contemporaneous clinical evidence and recorded history may not be necessary." *Harris* at 1351.

REASONS FOR GRANTING THE WRIT

The presumption of soundness is one of many fundamental evidentiary advantages provided by Congress to minimize the burden upon veterans to produce specific evidence to establish a point at issue. The presumption of soundness affords the veteran the benefit of not having to produce actual medical evidence to establish that a condition that is identified in service did not exist prior to service so long as his service entrance examination contains no mention of such a condition and then any disease or injury diagnosed in service will be "presumed" to be

service connected. The expectation of the statute is that Congress requires the VA to compensate a veteran for any in-service injury or disease once the military has accepted the veteran into service.

The statute provides that the presumption of soundness may only be rebutted by clear and unmistakable evidence. The type of evidence that may be deemed to constitute "clear and unmistakable" is a critical issue as it relates to the veteran benefits adjudication scheme. The Congress intended that the clear and unmistakable evidence standard be a formidable burden upon the Agency that may not be easily overcome. Moreover, the statutory presumption of soundness, its corresponding regulation and the CAVC case law all establish that this evidentiary standard is formidable and cannot be satisfied by an unsupported post-service medical opinion.

However, the Federal Circuit's opinion below now creates an inconsistency between the statute, the regulation and established CAVC case law as to what constitutes clear and unmistakable evidence sufficient to rebut the presumption of soundness. In addition, and perhaps more importantly, the Federal Circuit's definition of clear and unmistakable evidence is completely incompatible with the pro-claimant nature of the veterans' benefits adjudication system and strips the presumption of soundness of any practical value to the veteran.

As such, this case presents the Court with the opportunity to provide definitive guidance as to what type of evidence constitutes clear and unmistakable evidence sufficient to rebut the presumption of soundness and by

so doing create harmony between the statute, regulation and CAV'C case law on the same.

As provided *supra*, 38 U.S.C. § 1111 is entitled the statutory presumption of soundness and provides, in relevant part, "that **every** veteran **shall** be taken to have been in sound condition when examined, accepted, and enrolled for service, **except** as to defects, infirmities, or disorders noted at the time . . . , **or where clear and unmistakable evidence** demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service." (*Emphasis added*). A plain reading of the statute indicates that absent any notation at the time of the induction examination, a veteran is presumed to be in sound condition when examined and accepted into service. The traditional rule that presumptions are not treated as evidence does not apply in veterans' law jurisprudence. *Cf. Collette v. Brown*, 82 F.3d 389 (Fed. Cir. 1996). The traditional rule fits in an adversarial process of adjudication where the parties each have distinct burdens of production and persuasion. Contrary to such a system, the legislative history of the Veterans' Judicial Review Act, Pub.L.No. 100-687, 102 Stat. 4105 (1988) provides that such adversarial concepts are not to be adopted in the veterans' adjudication system:

> Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits . . . Implicit in such a beneficial system has been an evolution of a completely ex parte system of adjudication in which Congress expects the VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, the

> VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is not room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusions or strict adherence to burden of proof.

H.R.Rep. No. 100-963 at 13, *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795. Thus, the traditional requirement of "basic facts" and "counter proof" regarding presumptions in an adversarial system are not consistent with the VA adjudication system where the adjudicator, who is charged with assisting in the development of the claim, also bears the burden of rebutting the presumption. *See, Caluza v. Brown*, 7 Vet.App. 498, 508 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996). Instead, the presumption of soundness is treated as evidence favoring a veteran's claim for service connection and must be accorded important value. *See, Akins v. Derwinski*, 1 Vet.App. 228, 230 (1991).

Once the presumption has attached, it may only be rebutted by the government with clear and unmistakable evidence that a disability existed prior to service. *Junstrum v. Brown*, 6 Vet.App. 264, 266 (1994). The statute, itself, does not define what constitutes "clear and unmistakable evidence". This absence of a definition was noted by the Federal Circuit in its opinion below. *Harris*, 203 F.3d at 1349. The Federal Circuit stated that the statute stated nothing about the kind of evidence that could be used to rebut the presumption, and that therefore it only required that "the evidence, whatever it may be, must lead, clearly and unmistakably, to the conclusion that the injury or disease existed before the veteran entered the service." *Id.*

In reaching this interpretation, the Federal Circuit ignored this Court's mandate that veteran benefits statutes, especially those silent on a matter, must be interpreted in the light most favorable to the veteran. *See, King v. St. Vincent's Hospital*, 502 U.S. 215 (1991) and *Brown v. Gardner*, 513 U.S. 115 (1994). In the present case, the interpretation of the statute most favorable to the veteran is that post-service medical opinions alone do not constitute clear and unmistakable evidence, as a matter of law. Instead, the post-service medical opinion must be based on contemporaneous pre-service medical evidence documenting a pre-service disease or injury. This interpretation is further supported by both the corresponding regulation and CAVC case law.

As stated *supra*, 38 C.F.R. § 3.304(b) is the regulation that corresponds to the statutory presumption of soundness. Like the statute, the regulation provides that only clear and unmistakable evidence may rebut the presumption. Although the regulation also does not specifically state the kind of evidence that constitutes clear and unmistakable evidence required to rebut the presumption, it does provide guidelines on what should be considered when determining whether a disability preexisted service. Specifically, 38 C.F.R. § 3.304(b)(1) provides that history of preservice existence of conditions that is recorded at the time of the induction examination does not constitute a notation for purposes of defeating the presumption. This point is important because it establishes that the presumption applies to a veteran even if he acknowledges that the disease or injury preexisted service. Meaning, that it takes something more than a veteran's own statements, such as a preservice medical

record, to establish that a disease or injury preexisted service, to deprive the veteran of this important evidentiary presumption.

Further, the regulation provides that history "conforming to medical principles" must be considered in conjunction with basic clinical data that can be included within official and other records made "prior to, during or subsequent to service". *See*, 38 C.F.R. § 3.304(b)(2). The Federal Circuit pointed to this quoted language as support for its holding that "clear and unmistakable evidence" could be based upon post-service medical opinion only. However, a reading of the regulation establishes no such support. The regulation merely states that the veteran's health history should be given due consideration **in conjunction with** clinical data contained within post-service records. As such, the regulation does not state that post-service medical opinion regarding the inception of a disease is sufficient to rebut the presumption of soundness.

Finally, 38 C.F.R. § 3.304(b)(3) provides that a veteran's signed statements regarding the origin of his disease is "of no force and effect if other **data** do not establish the fact." This provision again establishes the strict standard of proof required to rebut the presumption of soundness. Although the regulation only refers to a veteran's "signed" statements, it is evident that the regulation's intent is that the veteran's own opinions as to the origin of the disease may not be used against him. To interpret the regulation otherwise conflicts with the veteran's physician-patient privilege, in which information provided to a physician by his patient may not be disclosed or used against the patient.

The Federal Circuit's opinion below abrogates the purpose of the regulation, as well as violates the veteran's physician-patient privilege, by allowing medical opinion based solely on a veteran's statements to his doctor, to be used as the factual predicate for the clear and unmistakable evidence to rebut the statutory presumption. Such an interpretation is clearly at odds with both the statute, the regulation and well-established rules of evidence as it relates to privileged communications. The plain language of the regulation provides that there must be other **data** establishing the origin of the disease in order to rebut the presumption. Data should not be interpreted to mean a medical opinion based upon the veteran's statement, but instead connotates some sort of clinical evidence establishing that the disease existed prior to service.

Lastly, the CAVC's own case law recognizes the strict burden of proof that constitutes clear and unmistakable evidence. In *Miller v. West*, 11 Vet.App. 345 (1998), a veteran appealed a BVA decision that denied entitlement to service connection for a psychological disorder. The BVA determined that the presumption of soundness had been rebutted in that case based upon a July 1968 psychiatric report (the veteran served on active duty from 1966 to August 1968) that opined that the veteran's disorder existed prior to service. The Veteran's Court held that the 1968 report did not constitute clear and unmistakable evidence because it was "not supported by any contemporaneous clinical evidence or recorded history in this record". *Id.* at 348. The CAVC went on to hold that a medical professional's bare conclusion **without any factual predicate** in the record did "not constitute clear and

unmistakable evidence sufficient to rebut the statutory presumption of soundness". *Id.* As such, the *Miller* case holds that if a post-service medical opinion is used to rebut the presumption of soundness, then the opinion must be supported by some factual predicate in the record such as contemporaneous clinical evidence or recorded history.

The Federal Circuit, in its opinion below, dismissed such a requirement by finding that the *Miller* case was only concerned with the "overall paucity of evidence of preservice mental illness". The Federal Circuit misunderstands the import of *Miller*, which is supported by 38 C.F.R. § 3.304(b)(1) and (2). In *Miller*, the CAVC explicitly held that a post-service medical opinion that is not based on or supported by any contemporaneous clinical evidence or recorded history "does not constitute clear and unmistakable evidence". The CAVC did not merely find that the evidence was not sufficient to rebut the presumption, but found that such type of evidence is not even in the category of clear and unmistakable evidence.

Further, in *Vanerson v. West*, 12 Vet.App. 254 (1999), a veteran appealed a BVA decision that determined that he was not entitled to service connection for a seizure disorder. Specifically, the veteran contested the BVA's finding that the presumption of soundness had been rebutted by clear and unmistakable evidence. On appeal, the CAVC held that "clear and unmistakable evidence" sufficient to rebut the presumption of evidence required that the Secretary consider all the evidence of record in order to determine whether such a high standard had been met. *Id.* at 254. Specifically, the CAVC held that "[p]ursuant to section 3.304(b), the question is not whether the Secretary

has sustained a burden of producing evidence, but whether the evidence as a whole, clearly and unmistakably demonstrates that the injury or disease existed prior to service." *Id.* The CAVC then reversed the BVA's finding stating that it could find "no basis in the record on appeal for the Board's factual finding that the 1996 VA neurological examination established that the seizure disorder preexisted service. See Miller, supra;" *Id.* In a concurring opinion, Chief Judge Nebeker stated that,

> as a matter of law, the evidence tending to show a preservice condition, when considered with all of the evidence, as the majority opinion accurately states, cannot present an unmistakable rebuttal of the presumption of soundness. If rebuttal of the presumption could be accomplished by a preponderance of the evidence, with reasonable inferences drawn therefrom, we would have a different case for review. But that is not possible under an 'unmistakable' standard. Inferences are permitted, and while there is room for mistake under the 'reasonable certainty' requirements of a 'clear and convincing' standard of proof case; **only an inference that is iron clad and copper riveted can be 'unmistakable'.**

Id. (*emphasis added*).

Thus, *Vanerson* holds that the clear and unmistakable standard is a strict one that is not easily overcome. As such, the case clearly supports the argument that post-service medical opinion that is not supported by contemporaneous pre-service medical evidence documenting a pre-service disease or injury cannot constitute clear and

unmistakable evidence sufficient to rebut the presumption of soundness.

If the Federal Circuit's opinion below, which holds that a post-service medical opinion not supported by a contemporaneous pre-service medical record can constitute clear and unmistakable evidence, renders the presumption of soundness meaningless. The Federal Circuit's opinion allows the VA to summarily rebut the presumption of soundness in **every** case by merely providing an expert opinion. Clearly, such a result is completely at odds with Congressional intent in creating the presumption in the first place.

Therefore, the Appellant requests this Court to provide a definitive interpretation on whether clear and unmistakable evidence sufficient to rebut the presumption of soundness may be based upon post-service medical opinion that is unsupported by pre-service medical evidence.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

99-7057

EDWARD HARRIS,

Claimant-Appellant,

v.

TOGO D. WEST, JR., Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: February 17, 2000

Before MAYER, *Chief Judge*, BRYSON, and GAJARSA, *Circuit Judges*.

BRYSON, *Circuit Judge*.

Edward Harris, a veteran, appeals from the judgment of the Court of Appeals for Veterans Claims, which held that a problem with his eyesight was not shown to be service connected. We affirm.

I

Mr. Harris served on active duty in the United States Army from August 1949 to November 1952. In 1959, he made a claim of service connection for an eye condition known as retinitis pigmentosa. The Board of Veterans' Appeals denied his claim at that time, and in 1978 and 1988 the Board denied requests to reopen his claim. In 1989, Mr. Harris requested that his claim of service connection for his retinitis pigmentosa be reconsidered. In

1992, the Board granted reconsideration of the 1959, 1978, and 1988 decisions, and after several years of proceedings before the regional office and the Board of Veterans' Appeals, the Board requested the opinion of a medical expert from a Veterans Affairs Medical Center. Dr. Frank Rieger, Chief of Ophthalmology Services at the Harry S. Truman Veterans Affairs Medical Center, subsequently submitted a report in which he concluded that Mr. Harris suffered from retinitis pigmentosa prior to August 1949 when he was inducted into military service and that the decreased visual acuity he experienced during his service was consistent with the natural progression of the disease.

Following the receipt of Dr. Rieger's report, the Board of Veterans' Appeals in 1996 again denied service connection for Mr. Harris's condition. The Board concluded that even though retinitis pigmentosa was not recorded on Mr. Harris's service entrance examination, "the evidence clearly and unmistakably demonstrates that retinitis pigmentosa pre-existed the veteran's entry into active service," and that "any increase in retinitis pigmentosa during active service was due to the natural progress of that condition."

Mr. Harris appealed to the Court of Appeals for Veterans Claims, which affirmed the Board's decision. The court noted that under 38 U.S.C. § 1111 and 38 C.F.R. § 3.304(b), a veteran is entitled to service connection for a disease that was present in service unless the disease was noted in an examination report at the time of entrance into service, or unless clear and unmistakable evidence shows that the veteran contracted the disease prior to

service and that the disease was not aggravated by service. The court further explained that the government bore the burden of proof to rebut the presumption of sound condition upon induction, *i.e.*, to show that the veteran incurred the disease or injury in question prior to service and that the disease or injury was not aggravated by service.

It was undisputed that Mr. Harris's entrance examination did not note retinitis pigmentosa. For that reason, Mr. Harris was entitled to the presumption of sound condition and the government was required to show by clear and unmistakable evidence that Mr. Harris suffered from retinitis pigmentosa prior to his entry into the service and that his condition was not aggravated by service.

After analyzing the evidence of record, the court concluded that the government had met its burden of rebutting the presumption of sound condition. The court noted that at the time of his diagnosis in 1951, Mr. Harris reported that he had an eight-year history of poor night vision, and various post-service medical records noted that he had had symptoms of night blindness from an early age. The court further noted that Dr. Rieger had concluded from all the medical evidence in the record that Mr. Harris had developed retinitis pigmentosa before entering the service and that, although his condition worsened during the period of his active duty, the worsening of his condition was simply the product of the natural progression of the disease. The court found that the presumption of soundness was rebutted by the evidence in the record; in particular, the court noted that "Dr. Rieger's unequivocal and uncontradicted opinion is

itself clear evidence to the contrary and is supported by the repeated assertions that the veteran had suffered from night blindness since childhood." The court therefore affirmed the decision of the Board of Veterans' Appeals.

II

On appeal to this court, Mr. Harris does not directly challenge the factual conclusion of the Court of Appeals for Veterans Claims that the onset of his retinitis pigmentosa occurred prior to his entry into military service. Instead, he makes the legal argument that the statutory presumption of soundness may be rebutted only by contemporaneous preservice clinical evidence or recorded history showing that the veteran was suffering from the disease or condition in question before entering military service. The presumption cannot be rebutted, Mr. Harris argues, by a medical professional's after-the-fact opinion regarding the probable onset of the disease or condition.

In making this argument, Mr. Harris relies on the statute that sets forth the presumption of soundness, 38 U.S.C. § 1111, but the statute does not support him. The statute simply says that in cases in which the presumption of soundness applies, it may be rebutted only "where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by [the veteran's military] service." *Id.* The statute says nothing about the kind of evidence that can be used to rebut the presumption. All that the statute requires is that the evidence, whatever it

may be, must lead, clearly and unmistakably, to the conclusion that the injury or disease existed before the veteran entered the service.

The regulation that tracks and elaborates on the statutory presumption of soundness, 38 C.F.R. § 3.304(b), likewise does not support Mr. Harris's argument. In fact, it provides strong support for the contrary view. The regulation states that the history of preservice conditions recorded at the time of examination "will be considered together with all other material evidence in determinations as to inception." 38 C.F.R. § 3.304(b)(1). The regulation further emphasizes the breadth of the required inquiry:

> History conforming to accepted medical principles should be given due consideration, in conjunction with basic clinical data, and be accorded probative value consistent with accepted medical and evidentiary principles in relation to value consistent with accepted medical evidence relating to incurrence, symptoms and course of the injury or disease, including official and other records made prior to, during or subsequent to service, together with all other lay and medical evidence concerning the inception, development and manifestations of the particular condition will be taken into full account.

38 C.F.R. § 3.304(b)(2). The regulation emphasizes that in determining whether the presumption of soundness has been rebutted, the finder of fact should consider all medically accepted evidence bearing on whether the service

member was suffering from the disease or injury in question prior to induction and should give weight to particular evidence based on accepted medical standards and medical knowledge regarding the known characteristics of particular diseases. In particular, the regulation permits the finder of fact to consider records made "prior to, during or subsequent to service" concerning the inception of the disease. The regulation thus does not support Mr. Harris's contention that the presumption of soundness can be rebutted only if the government adduces preservice clinical evidence that the veteran's disease or injury had its onset prior to induction.

Mr. Harris relies heavily on the decision of the Court of Appeals for Veterans Claims in *Miller v. West*, 11 Vet. App. 345 (1998). Decisions of the Court of Appeals for Veterans Claims are not binding on us, however, and in any event the *Miller* decision does not support Mr. Harris's legal position.

In *Miller*, the court reviewed a decision of the Board of Veterans' Appeals that held a veteran ineligible for benefits based on a psychiatric condition. The Board found that although the presumption of soundness was applicable, it had been rebutted by the evidence in the record. The court noted that the only evidence supporting the Board's conclusion that the veteran suffered from the psychiatric condition in question prior to service consisted of July 1968 reports of a psychiatric evaluation and medical board, which stated in conclusory fashion that the veteran suffered from schizophrenia and that the condition predated his military service. The court noted that the two 1968 reports were "not supported by any contemporaneous clinical evidence or recorded history in

this record." *Id.* at 347. The court added, "[a] bare conclusion, even one written by a medical professional, without a predicate in the record does not constitute clear and unmistakable evidence sufficient to rebut the statutory presumption of soundness." *Id.* Accordingly, the court held that on the record in the case before it the presumption of soundness had not been rebutted.

Mr. Harris seizes on the reference to "contemporaneous clinical evidence" and "recorded history" in the court's opinion and seeks to derive from the use of those words a strict standard requiring such evidence in every instance in which the government seeks to rebut the statutory presumption of soundness. As the context of the statement in *Miller* makes clear, the *Miller* case does not stand for such a rule. The court referred to the absence of contemporary clinical evidence and recorded history as part of its analysis of the weakness of the evidence that the government had offered to rebut the statutory presumption. Nothing in the court's opinion suggests that without such evidence the presumption can never be rebutted, no matter how strong the other rebutting evidence might be. Indeed, the next sentence of the court's opinion, in which the court noted that the 1968 reports contained bare conclusions regarding the veteran's preinduction condition, demonstrate that the court was concerned with the overall paucity of evidence of preservice mental illness, not the particular kind of evidence on which the government sought to rely.

While contemporaneous clinical evidence or recorded history may often be necessary to satisfy the heavy burden of rebutting the statutory presumption of soundness, we conclude that there is no absolute rule in the statute,

the regulation, or the case law requiring such evidence before the presumption can be rebutted. In a case such as the one before us, in which a later medical opinion is based on statements made by the veteran about the pre-service history of his condition, contemporaneous clinical evidence and recorded history may not be necessary. Accordingly, we reject Mr. Harris's legal claim that such evidence must be introduced in any case in which the government seeks to rebut the statutory presumption of soundness. We do not address the question whether the evidence in this case was sufficient to rebut the presumption, because that question involves the application of a law or regulation as applied to the facts of a particular case, which is a matter outside our jurisdiction to review decisions of the Court of Appeals for Veterans Claims. *See* 38 U.S.C. § 7292(d)(2).

AFFIRMED.

UNITED STATES COURT OF VETERANS APPEALS

No. 96-926

EDWARD HARRIS, APPELLANT,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided SEP 22 1998)

Kenneth M. Carpenter was on the brief for the appellant.

Robert E. Coy, Acting General Counsel; *Ron Garvin*, Assistant General Counsel; *R. Randall Campbell*, Deputy Assistant General Counsel; and *John D. McNamee*, were on the brief for the appellee.

Peter Link was on the brief for Blinded Veterans Association as amicus curiae.

Before NEBEKER, *Chief Judge*, and FARLEY and STEINBERG, *Judges*.

FARLEY, *Judge*: This is an appeal from an April 17, 1996, Board of Veterans' Appeals (Board or BVA) decision which denied the veteran's claim for service connection for retinitis pigmentosa. Record (R.) at 10-11. Both parties filed briefs, and the Blinded Veterans Association filed an amicus curiae brief in support of the appellant. The Secretary filed a motion to strike the amicus brief; that motion is denied. This appeal is timely, and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). For

the following reasons, the Court will affirm the Board's decision.

I. FACTS

The veteran served on active duty in the U.S. Army from August 1949 to November 1952. *See* R. at 10. A March 1959 decision of the BVA (R. at 110-11) denied the veteran's claim for service connection for retinitis pigmentosa, and July 1978 (R. at 179-83) and March 1988 (R. at 291-95) BVA decisions denied his requests to reopen that claim. On July 5, 1989, the veteran filed a statement in support of claim requesting that his "file be reviewed" for service connection for retinitis pigmentosa. R. at 299. Also on that date, the veteran's service representative filed a document titled "Notice of Disagreement" (NOD) arguing, inter alia, that the veteran's claim had been inappropriately denied, that he was entitled to the presumption of soundness at entry into service and the presumption of aggravation in service, and that there was no evidence that retinitis pigmentosa is a congenital condition. R. at 302. An attached statement by the veteran's representative repeated those assertions and concluded: "[W]e believe the denial of the veteran's original claim for service connection was clearly in error." R. at 303-04. There is no RO decision in the record on appeal (ROA) as to which that filing could constitute a timely NOD. See 38 U.S.C. § 7105(b)(1).

In August 1989, the RO issued a Statement of the Case (SOC), which identified the issue as "Reconsideration of entitlement to service connection for retinitis pigmentosa" and referred to a July 25, 1989, RO decision –

not present in the ROA – that continued the prior denial of service connection for retinitis pigmentosa. R. at 306-08. In September 1989, the veteran filed a VA Form 1-9, Appeal to the Board of Veterans' Appeals (Form 1-9), that sought "reconsideration" of the service connection issue, listing the date of the decision being appealed as "7-5-89." R. at 311. An October 10, 1989, statement of his service representative similarly sought "reconsideration" of the claim. R. at 313. A July 1991 BVA decision determined that the RO had not appropriately applied a reopening analysis under 38 U.S.C. § 5108 and *Manio v. Derwinski*, 1 Vet.App. 140 (1991), and remanded the claim for a determination of whether the veteran had presented new and material evidence to reopen the prior disallowance of his claim for service connection for retinitis pigmentosa. R. at 332-35. On remand, an October 1991 RO decision concluded that there was no new and material evidence. R. at 337-38. In a February 1992 statement, the appellant's representative argued: "It would appear [that] the R.O. is trying to avoid this s/c [service connection] issue by hiding behind the issue of materiality of evidence." R. at 346.

On September 24, 1992, the BVA Deputy Vice Chairman ordered reconsideration of the 1959, 1978, and 1988 BVA decisions. R. at 363. That order notes: "Information currently available to the Board does not show that a Notice of Appeal was filed with the United States Court of Veterans Appeals in this case prior to the date that *your motion* for reconsideration *was filed with the Board.*" *Id.* (emphasis added). The order does not, however, otherwise identify a specific motion for BVA reconsideration, and it is not clear what "motion" that order relies upon or

whether it is to be interpreted as a sua sponte order of reconsideration. The ROA contains no record of any such reconsideration motion ever having been filed with the Board by the appellant.

In May 1993, an expanded Board section issued a reconsidered decision that again remanded the case to the RO for the consideration of additional evidence submitted by the veteran in response to the order for reconsideration and then a return to the Board if the benefit sought remained denied. R. at 371-73. On remand, the RO found no new and material evidence. R. at 380-81. In October 1994, an expanded section of the Board again remanded the case to the RO for de novo review of the entire record because the RO had incorrectly applied a new-and-material-evidence analysis. R. at 392-94. On remand, the RO denied service connection (R. at 397-99), and the claim was returned to the Board (*See* R. at 401).

In July 1995, the BVA requested a medical expert opinion from the Harry S. Truman VA Medical Center (VAMC). R. at 415-17. Dr. Frank Rieger, the Chief of Ophthalmology Service at the VAMC, submitted his opinion on August 8, 1995. R. at 419-20. Dr. Rieger opined that the veteran did have retinitis pigmentosa prior to August 1949 when he was inducted into military service and that the decreased visual acuity he experienced during service was consistent with the natural progression of the disease. *Id.* In the April 17, 1996, BVA decision here on appeal, the Board denied service connection for retinitis pigmentosa. The Board concluded that, although retinitis pigmentosa was not recorded on the service entrance examination, "the evidence clearly and unmistakably

demonstrates that retinitis pigmentosa preexisted the veteran's entry into active service" and that "any increase in retinitis pigmentosa during active service was due to the natural progress of that condition." R. at 11. That decision notes: "The final decision by the Reconsideration Section will replace the March 1959 decision of the Board." R. at 10.

II. ANALYSIS

The appellant argues that the Board erred in concluding that his retinitis pigmentosa preexisted service or, in the alternative, that even if that condition preexisted service the evidence of record demonstrates that his retinitis pigmentosa was aggravated in service. Amicus curiae argues that the Board, because its decision was made as a result of an order granting reconsideration of a prior BVA decision, erred in relying upon evidence obtained after the 1959 Board decision. Before reaching the merits, the Court must first satisfy itself that it possesses jurisdiction over the April 1996 BVA decision which resulted from an order granting reconsideration of a 1959 BVA decision. *See Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996) ("any statutory tribunal must ensure that it has jurisdiction over each case *before* adjudicating the merits").

A. Jurisdiction

This Court's appellate jurisdiction derives exclusively from statutory grants of authority provided by Congress and may not be extended beyond that permitted by law. *See Skinner v. Derwinski*, 1 Vet.App. 2, 3 (1990).

In general, the Court has jurisdiction to review only those final BVA decisions prior to which an NOD was filed on or after November 18, 1988, as to an underlying decision of an RO or other agency of original jurisdiction (AOJ). *See* Veterans' Judicial Review Act, Pub. L. No. 100-687 § 402, 102 Stat. 4105, 4122 (1988) (found at 38 U.S.C. § 7251 note) [hereinafter VJRA § 402]. Therefore, provided there is a jurisdiction-conferring NOD, the Court has jurisdiction to review BVA reconsidered decisions as well as original BVA decisions. *See, e.g., Brienza v. Derwinski,* 2 Vet.App. 584, 585-86 (1992) (per curiam order); *Rosler v. Derwinski,* 1 Vet.App. 241, 249 (1991); *see also Mayer v. Brown,* 37 F.3d 618, 619-20 (Fed. Cir. 1994) (Court has jurisdiction over a denial of a motion for BVA reconsideration only if it has jurisdiction over the underlying BVA decision).

In *Smith v. Brown,* this Court stated:

> Here, the appellant filed an NOD in September 1990 respecting an RO decision refusing to reopen his claim. Propelled by that NOD, the BVA issued a decision in August 1991. In response to the August 1991 decision, the appellant filed a motion for reconsideration of that, and only that, Board decision. The Secretary argues that the BVA's sua sponte initiative in reaching back to an earlier BVA decision which had been issued pursuant to an earlier NOD, vitiates the appellant's September 1990 NOD. This argument must fail.
>
> At the time the appellant filed his September 1990 NOD it was a valid NOD, under VJRA § 402, *for purposes of conveying jurisdiction on this Court over the issue whether he is entitled to service*

> *connection for a seizure disorder. See Hamilton* [*v. Brown*, 4 Vet.App. 528 (1993), *aff'd*, 39 F.3d 1574 (Fed. Cir. 1994)]; *Bernard v. Brown*, 4 Vet.App. 384, 390 (1993) (NOD as to RO refusal to reopen service-connection claim gives Board jurisdiction to decide *merits of that claim*). Such timely filing of a post-VJRA NOD had judicial-review-conferring potential not possessed by the earlier, pre-VJRA NOD and gave the appellant a right to a future Court decision on that claim once a final, adverse Board decision was issued and a timely Notice of Appeal (NOA) under 38 U.S.C. § 7266(a) was filed. *But see Frazer v. Brown*, 6 Vet.App. 19, 23 (1993).

8 Vet.App. 546, 551 (1996) (en banc) (emphasis added).

Here, the veteran sought reopening of his claim in 1989. R. at 299, 302. When reopening was denied (*see* R. at 307), he filed a Form 1-9 (R. at 311) which satisfied the requirements for a timely NOD (*see Malgapo v. Derwinski*, 1 Vet.App. 397, 398-99 (1991) (Form 1-9 can be considered an NOD)) with that decision and perfected his appeal to the BVA. This NOD, in turn, prompted (i) the BVA to remand; (ii) the RO to issue a confirmed decision; (iii) the BVA *sua sponte* to order reconsideration of its 1959, 1978, and 1988 decisions; and (iv) the Board to issue the April 17, 1996, decision now before this Court. The NOD led directly to the Board decision on appeal. Since there is a timely NOD and Notice of Appeal (NOA), this Court has jurisdiction over the April 1996 BVA decision denying the veteran's claim for service connection. *See Smith, supra.*

The Court finds no impediment to the exercise of jurisdiction in the fact that the Board has never specifically adjudicated whether there is new and material

evidence to reopen the veteran's previously and finally disallowed claim, choosing instead to order reconsideration and adjudicate the case de novo on the basis of all the evidence of record. *Cf. Butler v. Brown*, 9 Vet.App. 167, 171 (1996) (noting that in *Barnett, supra*, U.S. Court of Appeals for the Federal Circuit held that determination of whether or not there is new and material evidence to reopen is "a mandatory jurisdictional requirement"); *see also Routen v. West*, 142 F.3d 1434 (Fed. Cir. 1998). In the instant case, the BVA Deputy Vice Chairman's order of BVA reconsideration negated the three prior Board decisions. *See Dudnick v. Brown*, 9 Vet.App. 397, 397-98 (1996) (per curiam order) (filing of motion for BVA reconsideration abates finality of Board decision); *Rosler, supra*. Therefore, there was no prior final decision as to which new and material evidence would be required under section 5108, and the BVA did not need to address first the question of new and material evidence; rather, the Board properly reached a decision on the merits. *See Smallwood v. Brown*, 10 Vet.App. 93, 97 (1997) ("Court shall construe the 'reconsideration' decision as the decision that the Board was required to issue [initially].").

B. Nature of the Board's Review

Amicus curiae contends that the Board's April 1996 decision improperly relied upon evidence accumulated after the Board decision(s) (1959, 1978, and 1988) purportedly being reconsidered. *See* Brief of Amicus Curiae at 1. However, in *Boyer v. Derwinski*, 1 Vet.App. 531, 532 (1991), the Court stated:

> We hold that, as of January 1, 1989, the BVA was required by law to proceed in a case under reconsideration as though the initial panel decision had never been entered and, instead, to conduct a *de novo* review "based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."

Our decision in Boyer makes clear that the Board is not only permitted, but *required* to view all of the evidence of record (even that obtained after the BVA decision under reconsideration) when the BVA conducts its de novo review of the claim after reconsideration has been granted. Accordingly, we cannot accept the argument presented by amicus curiae.

C. Merits of the Appeal

Service connection for VA disability compensation purposes will be awarded to a veteran who served on active duty during a period of war, or during a post-1946 peacetime period, for any disease or injury that was incurred in or aggravated by a veteran's active service or for certain diseases that were initially manifested, generally to a degree of 10% or more, within a specified presumption period after separation from service. *See* 38 U.S.C. §§ 1110, 1112(a), 1116, 1131, 1133(a), 1137; 38 C.F.R. §§ 3.303(a), 3.306, 3.307 (1997). When a disease is first diagnosed after service but not within an applicable presumption period, service connection may nevertheless be established by evidence demonstrating that the disease was in fact incurred during the veteran's service. *See, e.g., Cosman v. Principi*, 3 Vet.App. 503, 505 (1992) ("even

though a veteran may not have had a particular condition diagnosed in service, or for many years afterwards, service connection can still be established"); *see also* 38 C.F.R. § 3.303(d) (1997). A service connection claim must be accompanied by evidence that establishes that the claimant currently has the claimed disability. *See Brammer v. Derwinski*, 3 Vet.App. 223 (1992); *Rabideau v. Derwinski*, 2 Vet.App. 141, 144 (1992). A determination as to service connection is a question of fact that the Court reviews under a "clearly erroneous" standard of review. *See Hayes v. Brown*, 9 Vet.App. 67, 72 (1996); 38 U.S.C. § 7261(a)(4). "[I]f there is a 'plausible' basis in the record for the factual determinations of the BVA, . . . [the Court] cannot overturn them." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990).

Under 38 U.S.C. § 1111 and 38 C.F.R. § 3.304(b) (1997), a veteran "is entitled to service connection for a disease present in service unless the disease was noted in an examination report at the time of entrance into service or clear and unmistakable evidence shows that the veteran's disease pre-existed service and was not aggravated thereby." *Lichtenfels v. Derwinski*, 1 Vet.App. 484, 486 (1991). Moreover,

> the burden of proof is on the government to rebut the presumption of sound condition upon induction by showing that the disorder existed prior to service and, if the government meets this requirement, by showing that the condition was not aggravated by service. . . . Whether or not there is such evidence is a legal determination [that] the Court reviews de novo.

Kinnaman v. Principi, 4 Vet.App. 20, 27 (1993); 38 U.S.C. § 1153; 38 C.F.R. § 3.306 (1997).

The appellant argues that the presumption of soundness attached because his August 1949 entrance examination, although noting defective vision, did not note retinitis pigmentosa. *See* R. at 23-24. The veteran was diagnosed with retinitis pigmentosa in 1951, at which time it was reported that he had an eight-year history of poor night vision that had worsened in the last year. R. at 51-52, 54, 59-69. (In a November 1994 statement, the veteran argued that he had been misunderstood in service and that he had stated that he had suffered from poor night vision for "a" year not "eight" years. R. at 409.) His discharge examination noted poor vision and recorded a slight deterioration in visual acuity from the entrance examination in his left eye. R. at 71. His eyes continued to deteriorate after service. R. at 91, 119, 150. Various reports since service noted symptoms of night blindness since childhood. R. at 119, 132, 137, 187, 328. Also of record are lay statements attempting to connect the veteran's use of a microscope in service to an aggravation of his eye condition (R. at 144, 146, 168, 191, 264) and medical statements that noted, inter alia, "some reasonable evidence that excessive light has some effect on the retina in [retinitis pigmentosa] cases" (R. at 162); that "[u]se of the microscope would not under ordinary conditions be thought of as constant illumination" (R. at 148); and that "ordinary daylight may have a deleterious effect on the vision of patients with retinitis pigmentosa" (R. at 185; *see also* R. at 198). See also R. at 240-52. In December 1978, Dr. Heckenlively stated that the veteran "was most likely losing visual field over the period 1949-52, as this

would be the normal course that a person with his disease would have in this stage of their disease." R. at 187. He was "unable to state whether viewing samples through a light microscope for extended periods would contribute to any progression of his problem though this is theoretically possible." *Id.* Also of record is Dr. Rieger's August 1995 VA medical opinion which concluded that the veteran's retinitis pigmentosa preexisted service and that, although it worsened during service, such worsening was "commiserate [sic] with the natural progression" of the condition. R. at 419-20.

Upon de novo review, the Court concludes that there was clear and unmistakable evidence to rebut the presumptions of soundness and aggravation. Although retinitis pigmentosa was not noted on the veteran's entrance examination and his vision defect did worsen in service, Dr. Rieger's unequivocal and uncontradicted opinion is itself clear evidence to the contrary and is supported by the repeated assertions that the veteran had suffered from night blindness since childhood. *See Crowe v. Brown*, 7 Vet.App. 238, 426 (1994) (record lacking a medical opinion specifically addressing the relevant question was insufficient to determine whether there was clear and unmistakable evidence); *Kinnaman*, 4 Vet.App. at 27 (physician's statement as to probability that condition preexisted service was not clear and unmistakable evidence).

III. CONCLUSION

Upon consideration of the ROA and the briefs of the parties and amicus curie, the Court finds that the appellant has not demonstrated that the Board committed

either factual or legal error which would warrant reversal or remand. *Gilbert, supra; see also Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); *Danville Plywood Corp. v. United States*, 899 F.2d 3 (Fed. Cir. 1990). The Court also is satisfied that the BVA decision meets the "reasons or bases" requirements of 38 U.S.C. § 7104(d)(1). *See Gilbert, supra*. Accordingly, the April 17, 1996, decision of the Board of Veterans' Appeals is AFFIRMED.